

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
July 9, 2009 Session

IN RE A. L.T.

Appeal from the Circuit Court for Robertson County  
No. 12124 Ross H. Hicks, Judge

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No. M2009-00358-COA-R3-PT - Filed October 8, 2009

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Mother sought termination of Father's parental rights and to allow Mother's husband to adopt the child. The trial court denied Mother's petition having found that Father had not willfully abandoned the child. Mother appeals and finding no error, we affirm the judgment of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed**

RICHARD H. DINKINS, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P. J., M. S. and ANDY D. BENNETT, J., joined.

Gary M. Williams, Hendersonville, Tennessee, for the appellant, K.M. and A.M..

R.L.T., Goodlettsville, Tennessee, Pro Se.

**MEMORANDUM OPINION<sup>1</sup>**

**I. Background**

Mother and her husband filed the present action on March 14, 2008, seeking to terminate Father's parental rights and to permit Mother's husband to adopt A.L.T. Mother and Father divorced in September 2004, and both subsequently remarried. Mother and Father's relationship had been strained since before they divorced, with much of the disagreement over how to appropriately parent A.L.T. The September 29, 2004, divorce decree established Mother as the primary residential parent and gave Father visitation with A.L.T. every other weekend. Father was ordered to pay \$476.00 per

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<sup>1</sup> Tenn. R. Ct. App. 10 states:

This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

month in child support as well as provide health insurance for A.L.T.; Mother and Father were to divide any uncovered medical bills equally.

Since the divorce, Father consistently paid his child support obligation as well as maintained insurance coverage for A.L.T.; however, Father never fully exercised the visitation given to him in the divorce decree. In the first few years after the divorce, Father exercised his visitation with A.L.T., albeit somewhat irregularly, but as time passed Father's visits were less frequent and Father's last visit with A.L.T. was in October 2006. Father contends that he wanted to visit with A.L.T. more but he felt intimidated and bullied by Mother and eventually came to believe that A.L.T. did not want to talk with or visit him.

In her petition, Mother alleged that Father abandoned A.L.T. by failing to visit him for over a year. Mother also alleged that Father had refused to pay his share of A.L.T.'s medical bills. Father denied that he abandoned A.L.T. and asserted that he had "consistently paid child support since the parties' divorce as well as maintained medical insurance. His attempts to visit and speak to his son by telephone have been undermined and interfered with by the Petitioner, [Mother]."

A trial without a jury was held on December 17, 2008. The court heard testimony from Mother, Mother's husband, Father, and Father's wife as well as other family members of both Mother and Father. The trial court did not find by clear and convincing evidence that there had been a willful abandonment by Father of his son, A.L.T. The trial court explained:

The court finds that [Father] paid his child support, and although there was a year and five months gap in visitation, the Court does not find that [Father] willfully abandoned his child or intended to give up his parental rights. Although there are differences in the proof, the Court finds, at least in [Father's] mind, that [Mother] discouraged and interfered with his visiting and his exercise of his parental rights. The Court finds that the fact that [Mother] refused to allow [A.L.T.] to attend his paternal grandfather's funeral is indicative of her conclusion that she had cut [Father] out of [A.L.T.'s] life.

Although not necessary, the trial court also found that termination was not in the best interest of A.L.T. The trial court denied Mother's petition seeking to terminate Father's parental rights and ordered the original parenting plan entered at the time of the divorce to continue with Father gradually resuming full parenting time under the plan by March 1, 2009.

Mother appeals contending that the trial court erred in determining that Father had not willfully abandoned A.L.T. and that termination and subsequent adoption was not in A.L.T.'s best interest.

## II. Analysis

Parents have a fundamental right to the care, custody, and control of their children. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *In re Adoption of A.M.H.*, 215 S.W.3d 793, 809 (Tenn. 2007), *cert. den.*, 168 L.Ed.2d 729 (2007). However, that right is not absolute and may be terminated in certain circumstances. *Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982); *State Dep't of Children's Services v. C.H.K.* 154 S.W3d 586, 589 (Tenn. Ct. App. 2004).

Terminating parental rights has the legal effect of reducing the parent to the role of a complete stranger and of severing forever all legal rights and obligations of the parent and of the child; and the parent shall have no right thereafter to have any relationship, legal or otherwise, with the child. Tenn. Code Ann. § 36-1-113(l)(1). The United States Supreme Court has recognized the unique nature of proceedings to terminate parental rights, stating that “[f]ew consequences of judicial action are so grave as the severance of natural family ties.” *M.L.B. v. S.L.J.*, 519 U.S. 102, 119, (1996) (quoting *Santosky*, 455 U.S. at 787, (Rehnquist, J., dissenting)).

The statutes on termination of parental rights provide the only authority for a court to terminate a parent’s rights. *Osborn v. Marr*, 127 S.W.3d 737, 739 (Tenn. 2004); *In re Tiffany B.*, 228 S.W.3d 148, 155 (Tenn. Ct. App. 2007). Thus, parental rights may be terminated only where a statutorily defined ground exists. Tenn. Code Ann. § 36-1-113(c)(1); *Jones v. Garrett*, 92 S.W.3d 835, 838 (Tenn. 2002); *In re M.W.A.*, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998). To support the termination of parental rights, only one ground need be proved, so long as it is proved by clear and convincing evidence. *In the Matter of D.L.B.*, 118 S.W.3d 360, 367 (Tenn. 2003).

Because the decision to terminate parental rights affects fundamental constitutional rights and carries grave consequences, courts must apply a higher standard of proof when adjudicating termination cases. A court may terminate a person’s parental rights only if (1) the existence of at least one statutory ground is proved by clear and convincing evidence and (2) it is shown, also by clear and convincing evidence, that termination of the parent’s rights is in the best interest of the child. Tenn. Code Ann. § 36-1-113(c); *In re Adoption of A.M.H.*, 215 S.W.3d at 808-09; *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002). “This heightened standard . . . serves to prevent the unwarranted termination or interference with the biological parents’ rights to their children.” *In re M.W.A.*, 980 S.W.2d at 622.

In light of the heightened standard of proof in these cases, a reviewing court must adapt the customary standard of review set forth by Tenn. R. App. P. 13(d). *In re M.J.B.*, 140 S.W.3d at 654. As to the court’s findings of fact, our review is *de novo* with a presumption of correctness unless the evidence preponderates otherwise, in accordance with Tenn. R. App. P. 13(d). *Id.* We must then determine whether the facts, as found by the trial court or as supported by the preponderance of the evidence, clearly and convincingly establish the elements necessary to terminate parental rights. *Id.* As to the court’s conclusions of law, our review is *de novo* with no presumption of correctness. Tenn. R. App. P. 13(d); *In re Adoption of A.M.H.*, 215 S.W.3d 793 (Tenn. 2007).

### Abandonment By Failure to Visit

The sole ground for termination alleged is Father's willful abandonment of A.L.T. by failing to visit him for at least four months preceding the filing of the termination petition.

Tenn. Code Ann. § 36-1-113(g)(1) designates "abandonment," as defined in Tenn. Code Ann. § 36-1-102, as a ground for terminating parental rights. "Abandonment" is defined in part pertinent as follows:

For a period of four (4) consecutive months immediately preceding the filing of a proceeding or pleading to terminate the parental rights of the parent(s) or guardian(s) of the child who is the subject of the petition for termination of parental rights or adoption, that the parent(s) or guardian(s) either have willfully failed to visit or have willfully failed to support or have willfully failed to make reasonable payments toward the support of the child;

Tenn. Code Ann. § 36-1-102(1)(A)(i).

In order to find "abandonment," there must be a "willful" failure to visit by the parent whose rights are being terminated. *See In Re Swanson*, 2 S.W.3d 180, 184-85 (Tenn. 1999). "'Willfully failed to visit' means the willful failure, for a period of four (4) consecutive months, to visit or engage in more than token visitation." Tenn. Code Ann. § 36-1-102(1)(E). As found by the court in *In re S.M.*, 149 S.W.3d 632 (Tenn. Ct. App. 2004), "willfulness" in parental rights cases does not require the same standard of culpability required by the penal code nor does it require malevolence or ill will. *Id.* at 642. Where the failure to visit is not willful, however, a failure to visit a child for four months does not constitute abandonment. We have held that a parent who attempted to visit and maintain relations with his child, but was thwarted by the acts of others and circumstances beyond his control, did not willfully abandon his child. *In re Adoption of A.M.H.*, 215 S.W.3d at 810; *see In re Swanson*, 2 S.W.3d 180, 189 (Tenn. 1999).

The trial court found that there was not clear and convincing evidence that Father willfully abandoned A.L.T. because, while there was nearly one and one-half years gap in visitation, Mother "discouraged and interfered" with Father's visitation and the exercise of his parental rights. The trial court's finding that Mother discouraged and interfered with Father's visitation is a finding of fact. As such, it carries a presumption of correctness unless the evidence preponderates otherwise because the trial judge saw and heard the witnesses and observed their manner and demeanor on the stand and was, therefore, in a much better position than the appellate court to judge the weight and value of their testimony. *See Duncan v. Duncan*, 686 S.W.2d 568, 571 (Tenn. Ct. App. 1984); Tenn. R. App. P. 13(d); *In re M.J.B.*, 140 S.W.3d at 654. We also note proof in the record that Father continuously paid child support pursuant to the parenting plan and Father's testimony that he did not know what he could do about Mother's interference with his visitation. In our review of the record, we do not find that the evidence preponderates against the finding of the trial court. Mother failed to clearly and convincingly show that Father willfully abandoned A.L.T.

Because we have concluded that there are no grounds for terminating Father's parental rights, it is unnecessary to reach the best interest of the child analysis. *See In re D.L.B.*, 118 S.W.3d 360, 368 (Tenn. 2003); Tenn. Code Ann. § 36-1-113(c).

### **III. Conclusion**

For the foregoing reasons, we affirm the judgment of the trial court denying Mother's petition to terminate Father's parental rights.

Costs of the appeal are taxed to Mother.

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RICHARD H. DINKINS, JUDGE